level when determining repayment schedules. The statute requires that income be included but does not address the factors which the Secretary may, in his discretion, include.

The Secretary agrees with the commenters that payments should be adjusted for family size, that discretionary income levels for single and head-of-household borrowers should not be identical, and that payments for head-of-household borrowers should not be higher than those for married borrowers with the same income and debt levels. In order to revise the regulations accordingly, the Secretary has amended the definition of discretionary income. Under the revised regulations, discretionary income is now defined as AGI minus poverty levels established by HHS; these poverty levels take family size into account.

In response to the commenter's question as to when the Secretary would apply the adjusted income percentage factor, the Secretary will apply new income percentage factors and new HHS Poverty Guidelines at the same time that new interest rates are applied: each July

Finally, the Secretary assures the commenter who suggested that middle-income borrowers may be supporting lower-income borrowers that there is no cross-subsidization under either the existing or the revised income contingent repayment plan.

Changes: The income percentage chart has been revised to reflect only two categories of borrowers: single and married/head of household. Because the income percentage factors applicable to married and head-of-household borrowers will be identical, married and head-of-household borrowers with the same family size, income, and debt make the same monthly payments.

Section 685.209(a)(3) has been revised so that discretionary income is now defined as AGI minus the amount of the "HHS Poverty Guidelines for all States (except Alaska and Hawaii) and the District of Columbia" as published by the United States Department of Health and Human Services on an annual basis. For residents of Alaska and Hawaii, discretionary income is defined as a borrower's AGI minus the amounts in the "HHS Poverty Guidelines for Alaska" and the "HHS Poverty Guidelines for Hawaii" respectively. These guidelines adjust for family size.

Comments: One commenter stated that the Secretary should make the new income contingent repayment plan formula available on software, so that borrowers can calculate their payments. This commenter suggested extending the comment period until 30 days after

this software becomes available. In addition, this commenter suggested that the final regulation should include charts showing typical repayments over 25 years. In these charts, the commenter suggested that the Secretary show both the accrual and capitalization of interest during periods of negative amortization and during periods of positive amortization.

Discussion: The Secretary is considering making available to the public software for income contingent repayment calculations. However, the Secretary cannot extend the comment period until this software is available without seriously delaying the effective date of the regulations. In addition, the Secretary is not including charts showing typical repayments over 25 years. The Secretary will make such charts available in informational repayment materials provided to borrowers.

Changes: None.

Section 685.209(b) Treatment of Married Borrowers

Comments: Several commenters approved of the Secretary's treatment of married borrowers under the new income contingent repayment plan. However, one commenter argued against the Secretary's requiring borrowers who file their income tax separately from their spouse to obtain consent to disclosure of tax return information from their spouse. This commenter stated that the proposed policy would prohibit borrowers whose spouses are unwilling to provide this consent to disclosure from repaying under the income contingent repayment plan. Also, this commenter asked how the Secretary would determine whether the borrower is married.

One commenter suggested an alternative to the wording in the NPRM that provides that married borrowers who are legally separated are not required to obtain their spouse's consent to tax return disclosure. This commenter stated that the regulations should provide that the borrower is not required to obtain this consent to disclosure if the borrower provides proof that he or she is living apart from the spouse and has filed for divorce. According to this commenter, some states do not recognize the status of being legally separated.

One commenter questioned whether there were any provisions for married couples who choose to repay their loans jointly under the income contingent repayment plan and subsequently divorce and wish to separate their payments.

Discussion: The Secretary feels strongly that repayment amounts for married borrowers must be based on the income of the borrower and the borrower's spouse. This policy will ensure that payments from married borrowers are calculated based on an accurate assessment of the borrower's ability to repay. The Direct Loan Program offers borrowers a variety of repayment plans; therefore, a married borrower who is unable to repay under the income contingent repayment plan because the spouse is unwilling to provide consent to disclosure of tax return information would be eligible to repay under any of the other Direct Loan repayment plans. Further, the Secretary intends to update income information concerning borrowers' spouses annually.

To respond to the commenter's concern regarding how the Secretary would determine whether or not the borrower is married, the Secretary obtains a borrower's filing status (married, single, or head of household) from the Internal Revenue Service (IRS) when AGI information is reported. The Secretary acknowledges that some states do not recognize the status of "legally separated" and has made a change accordingly. Finally, with regard to the commenter's concern that married borrowers who have been repaying jointly should be able to begin repaying separately should they divorce, the Secretary assures the commenter that borrowers in joint repayment can always begin repaying separately at any time by changing their repayment plan option.

Changes: Section 685.209(b)(1) has been revised so that a married borrower who has filed taxes separately from his or her spouse and is "separated", rather than "legally separated", is not required to provide his or her spouse's written consent to disclosure of tax return information.

Section 685.209(c)(2) Alternative Documentation of Income

Comments: One commenter advocated allowing all borrowers to submit alternative documentation of income to establish monthly payments under the income contingent repayment plan while the Direct Loan Servicer is waiting for adjusted gross income (AGI) information from the IRS. Another commenter asked the Secretary to clarify whether the Secretary would require alternative documentation of income from borrowers who have been in repayment for a number of years but are in their first year of repayment under a Direct Consolidation Loan. In addition, this commenter noted that a